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ALEXANDER L. STEVENS,

IN THE

# Supreme Court of the United States

October Term, 1983

THE CITY OF COLUMBUS, a consolidated municipal government; J.R. ALLEN, Mayor (deceased); A.J. McCLUNG, Mayor Pro Tem; JOSEPH W. SARGIS, Director of Public Safety; LEONARD LEAVELL and HUGH BENTLEY, Members Police Hearing Board; B.F. MCGUFFEY, Chief of Police; and S.W. BROWN, Assistant Chief of Police,

*Petitioners,*

versus

ROBERT LEONARD; WILLIE L. PEARSON, JR.; VINSON WILLIS; JOHN H. CLARK, JR.; GARY L. SMITH; and FREDDIE L. WHITE,

*Respondents.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

### BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

MARGIE PITTS HAMES  
Atlanta, Georgia 30303

E. RICHARD LARSON  
New York, New York 10036

NEIL BRADLEY\*  
LAUGHLIN McDONALD  
CHRISTOPHER COATES  
American Civil Liberties  
Union Foundation, Inc.  
52 Fairlie Street, NW  
Atlanta, Georgia 30303  
(404) 523-2721

JOEL M. GORA  
250 Joralemon Street  
Brooklyn, New York 11201

ATTORNEYS FOR RESPONDENTS  
\*Counsel of Record

## STATEMENT OF THE CASE

This case concerns the dismissal of six black police officers from the Columbus, Georgia, police department in May, 1971. The court of appeals ruled that the dismissals violated the respondents' first amendment rights and remanded the matter for determination of an appropriate remedy. The relevant facts, few of which are set forth in the petition for writ of certiorari, are as follows.<sup>1</sup>

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1. Instead of referring to the facts in this record, the petitioners rely on matters in an opinion in a different case to try to paint a negative picture of respondents. They do so with neither accuracy nor fairness.

The case referred to, Community Action Group (CAG) v. City of Columbus, Civ. No. 1528 (M.D. Ga. 1971), 473 F.2d 966 (5th Cir. 1973), expressly did not determine any issues concerning the dismissals of these respondents. A-84, n.2. The CAG case focused on events that occurred weeks and months after the dismissals, and dealt with municipal efforts to control large scale demonstrations.

FOOTNOTE CONT'D NEXT PAGE...

1. Events leading to the Removal  
of the American Flag Emblems

In early 1971, respondents and other black police officers in the Columbus Police Department began to express their concern about what they believed to be racial discrimination within the depart-

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FOOTNOTE CONT'D

It is true that four respondents were among many plaintiffs in the CAG case. The petitioners choose to quote the court of appeals opinion in CAG that there was evidence that "some of the plaintiffs were involved in the arson fires..." Petition, 4. The district court opinion in CAG case, at A-92 to A-94, specifies what individuals were evidentially connected to arson. None is before this Court. Petitioners also refer to the arrests of two respondents-- which took place 54 days after they were fired, A-107, A-109--by reference to the district court opinion in the CAG case, Petition, 4, before commenting that "none of the present six [respondents] can be said to have committed specific crimes..." Ibid. Although even this "concession" was not included in the petitioners' court of appeals brief where they attempted the same diversion, the implication that respondents are vaguely guilty of unspecified crimes is as objectionable as it is unfounded.

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ment, manifested by unequal treatment of black officers in assignments, promotions, and disciplinary practices, and by police brutality against members of the black community. T. 8-9, 34-41, 44-45, 74-76, 78, 110, 130-31, 184-85, 205, 215.\*

These officers formed an organization known as the Afro-American Patrolmen's League [hereinafter the "League"] T. 12-13, 134, 226. The officers, via the League, presented their grievances to black community leaders and to police officials, but when no response was forthcoming, they decided to take the issues to the public. T. 9-12, 109-10, 131-33, 384.

On March 26, 1971, the League,

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\*Citations herein will be as follows: petition appendix - A - \_\_; pleadings - R.\_\_; transcript - T.\_\_; exhibits - Ex.\_\_.

through its spokesman Officer Leonard, a respondent here, issued a press release generally critical of police relations in the black community and calling for an investigation of several specific episodes. T. 70-78; Ex. D-13, T. 70-71. Officer Leonard detailed these charges at a press conference, where he voiced general complaints about the department but did not direct any specific criticism at any particular department official and made no reference to the identify of the officers involved in the various incidents. Ex. P-14, T. 438, 440.

During the same period, the League officers drew up a petition of grievances, describing their complaints of discrimination within the department. T. 14-15; Ex. P-1, T. 14. The petition detailed the League's concerns and set forth employment statistics of racial

imbalance, alleged discrimination in hiring, promotions, assignments, and pointed to discrepancies in disciplinary practices with regard to white and black officers.<sup>1</sup> Again, this petition did not contain any direct criticism of specific departmental supervisors. This petition of grievances was presented to the public on April 5, 1971, when League officials held a press conference in the city commission chambers for this purpose. T. 15, 54; Ex. D-1, T. 53, 58-59.

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1. At the trial, Officer Leonard detailed the factual and documentary basis for the grievances set forth in the League's petition. T. 36-48, 107-09. The defendants admitted that the plaintiffs' employment statistics were essentially correct, T. 275-76, 298-99; that the disciplinary procedures needed modification and updating, T. 385-86; and that, according to petitioner Sargis, the Director of Public Safety, "it could be shown that for what appeared to be similar violations of rules, unequal sentencing was engaged in." T. 387.

At the time of the March 26 press release and the April 5 news conference, respondents were not informed that these actions violated department regulations; nor were they told that these actions would result in the bringing of charges or serve as a basis for dismissal.

T. 108-09.

One of the League's primary complaints was that black officers were being subjected to discriminatory disciplinary treatment by the department. T. 131, 184, 205, 215. On May 29, 1971, John Brooks, an ill black patrolman, called in sick, knowing that under normal department practices the desk sergeant would arrange to reschedule the court cases at which Officer Brooks was to appear as a witness. T. 56, 64-65, 111. Instead, when Officer Brooks did not appear in court, he was charged with

contempt, and two officers were sent to his home to arrest him on those charges. T. 110. He was also suspended indefinitely on charges of conduct unbecoming an officer and feigning sickness to avoid duty. T. 342.

The respondents were unaware of any white officers who had been arrested for contempt or disciplined in this matter under similar circumstances. T. 16, 135-36, 185. After learning of Officer Brooks' arrest and trying unsuccessfully to confer with Chief McGuffey, T. 17, 158, 223, respondents and other black officers picketed the police station on May 29 and 30, 1971. T. 136, 158-59, 166-67. The picketing was peaceful and orderly at all times. T. 18. At no time were respondents advised that their picketing was unlawful or would result in their dismissal. T. 137.

On May 30, the black officers and various civic leaders met in an attempt to implement a 24-hour cooling-off period, with the understanding that the picketing would cease, no charges would be brought against the officers, and efforts would be made to deal with the grievances concerning the department. T. 18, 138-40. Black community leaders and Mayor Pro Tem McClung served as intermediaries, met with police officials at city hall, and emerged from the meeting with a statement that if the men stopped picketing, no charges would be brought and efforts would be made to resolve respondents' complaints. T. 137-40, 224-26.<sup>1</sup>

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1. Petitioner McClung claimed that he participated in those meetings not in his official capacity but as a private citizen, and that no promises were given other than that an effort would be made to work out some of the problems. T. 276-79.

Later that day, however, Officer Leonard was called off his beat and told to report to police headquarters. T. 19. When he arrived, the deputy chief read a list of charges which were to be brought against Mr. Leonard, but the deputy chief refused to give him a copy of those charges. T. 19, 144. Respondent John Clark, another League officer, was called in shortly thereafter and also orally presented various charges. T. 227, 240-41.

## 2. Removal of the American Flag Emblems

Believing that the charges threatened against the two League officers constituted a violation of the cooling-off period, the black police officers met on the morning of May 31 and decided to resume their protest against the police department. In the early after-

noon seven black officers, including the six respondents,<sup>1</sup> arrived in front of headquarters; the men were all off-duty but wore their police uniforms. T. 21, 228; Ex. D-2 to D-5, T. 59. They carried handlettered signs with statements such as: "We Don't Want To Be Policeboys; We Want To Be Policemen." Ibid. As before, the picketing was at all times peaceful and without incident. T. 21.

In mid-afternoon, with members of the press present, the respondents carefully assisted each other in removing the flag emblem from the sleeves of their uniforms. T. at 21, 147-49; Ex. D-2 to D-12, T. 59. The flags were removed carefully, thread by thread, with a

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1. The seventh officer was originally a plaintiff but withdrew shortly before trial. T. 4.

razor. At no time was the flag treated with disrespect; to the contrary, speaking for the other officers, Officer Leonard stated that they had no intention of degrading the American flag (under which most of them had served in Vietnam), that the flag symbolized liberty and justice for all, that black police officers were not receiving liberty or justice from the department, and that, until they did, they could not continue to wear the flag emblem.<sup>1</sup> A-5, A-6, T. 22-23, 163-65, 187, 248, 261.

Respondents' removal of the flag was

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1. Respondents testified at trial that they hold deep respect for the flag as a symbol of equality and justice. T. 22-23, 187, 228-29. They stated that they had engaged in the act of removing the flag emblem as a symbolic gesture, a method of dramatizing, for the police department and the public generally, the fact that their grievances about conditions in the department were deeply felt and had not been responded to. T. at 61, 112-13, 148-49, 228, 257, 267.

accompanied by no violence, disorder, or disturbance; and the flags were in no way mutilated or defaced. T. 23, 147-49, 188, 300. In fact, Officer Leonard attempted to present the flag emblems to Deputy Chief Brown, but when he refused to accept them, T. 23, Leonard placed the emblems in his pocket. T. 65.

Immediately thereafter, Deputy Chief Brown had a discussion with Chief McGuffey, T. 351, who in turn discussed the matter with Safety Director Sargis and Mayor Allen, T. 297, 369. At this hastily called conference, the mayor, director of public safety and police chief made a joint decision to fire respondents. Ibid.

Respondents continued picketing until they were ordered into a police major's office and given letters dismissing them from the department. A-6.

The letters stated that the respondents were discharged, effective that date, for violating two portions of the police regulations ("conduct unbecoming an officer..." and acting "contrary to good order and discipline") "in that you did publicly remove the American flag emblem from the Columbus Police Uniform while picketing in front of Police Headquarters on May 31, 1971." A-6, A-7.

The removal of the flag emblem was the sole reason specified for the dismissals. Respondents were not fired for engaging in political activity in uniform--Columbus does not prohibit policemen from engaging in off-duty political activity in uniform. Nor were respondents charged with disobeying orders or insubordination, T. 458-60, although the police regulations contained such a provision. Among the factors considered

in the decision to dismiss the respondents was their involvement "in a number of public displays, pronouncements, press releases, alleging these abuses in the police department." T. 370.<sup>1</sup>

### 3. The Flag Patch and Its Purpose

The entirety of the flag rule promulgation is found in Columbus City

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1. The court of appeals observed that the method used to dismiss respondents violated procedural protections afforded police officers by local ordinances and department rules in that the dismissals were summarily carried out without a prior hearing before a then existing police hearing board. A-8. A few days after their dismissal, the respondents requested such hearings, which were held in mid-July; the board upheld the dismissals. Since the court of appeals decision was based on first amendment grounds, there was no need to consider whether the violation of these local procedures afforded an additional basis for invalidating the dismissals.

Council minutes of August 18, 1969:

Mayor Allen stated that since Chief McGuffey was present, he would like to bring up [the] matter of flag patch to be worn on uniforms of police officers. He pointed out that this was being done in Macon with excellent results. Chief McGuffey concurred with Mayor Allen's recommendation. Mayor Allen moved that the flag patches be worn by police officers. Seconded by Commissioner Illges. All Commissioners voting yes.

Ex. D-23, T. 445-46.

It is questionable that this resolution was ever promulgated as a police directive. A-7, n.2. But it is clear that at times emblems were not available, they were never checked for at squad inspections, T. 27-28, 153-55, 165, 167-68, 193-94, 229, 243, one respondent had to pin a flag emblem on his shirt in order to remove it, T. 256, pictures of the protest show a white officer without a flag emblem, T. 302, a number

of officers invariably were without the flag patch, A-16, and respondents were the first officers ever disciplined for a flag emblem violation, T. 29, 302.

Indeed, the police chief, McGuffey, conceded at trial that the flag emblem served no law enforcement interests such as safety or helping the public identify persons as officers, T. 305, and he agreed that the absence of flag emblems does not affect police performance.

T. 316. Curiously, when respondents tried to ask the police chief, "What purpose was served by having the flag patch on the uniform?", counsel for the petitioners objected and the objection was sustained. T. 306. Later in the trial director of public safety, petitioner Sargis, was permitted to answer that same question. His response was that in Columbus the purpose "is

specific, it is not symbolic."

Q. What function did it serve?

A. Compliance with a resolution of the prior council of the City of Columbus, Georgia.

Q. That is the only reason for it?

A. Well, most department heads customarily try to comply with the resolutions and ordinances passed by the legislative body of the City of Columbus.

T. 395.

#### 4. Proceedings Below

In mid-June, 1971, the respondents filed the instant action contending that their dismissals violated their first amendment rights, that the sections of the police manual under which they were dismissed were vague and overbroad, that the dismissals were violative of due process and the result of discriminatory enforcement violating their rights to equal protection and due process of law. In February, 1975, a three-day trial

was held.<sup>1</sup> The district court entered an opinion in April, 1975, refusing to decide those claims and, instead, dismissing the complaint on jurisdiction and abstention grounds. A-56 to A-70.

In May, 1977, that decision was reversed by the fifth circuit, 551 F.2d 974 (5th Cir. 1977), A-45 to A-55, and the case was remanded for a decision on the merits. In so doing, the court of appeals noted that although a full trial had already been held, the district court was free to "allow the record to be appropriately supplemented." A-55, n.6. After a rehearing en banc the

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1. The original complaint had been brought on behalf on 38 black police officers and sought equitable relief against the allegedly discriminatory employment practices of the police department. Only the claims involving respondents' discharge were pursued at trial.

panel decision was unanimously affirmed, 565 F.2d 957 (5th Cir. 1977). In 1979, this Court denied review, 443 U.S. 905 (1979), A-37 to A-44, and rehearing, 444 U.S. 887 (1979).

In January, 1981, both sides filed motions for judgment on the existing record, R. 423, 500. A year later the district judge wrote to counsel and indicated that the case was "ready for disposition on the merits." See *la*, *infra*. Shortly thereafter the district court entered its decision. The first amendment claim was rejected on the ground that respondents' removal of the American flag emblem "was a calculated show of contempt for the City authority and a demonstration of refusal to obey its lawful ordinances, rules and commands.... If this was only 'symbolic speech', then it might well be presumed

that punching the Police Chief in the nose would also be so regarded." A-26. As the court of appeals subsequently observed, "[t]he district judge decided the first amendment claim without reference to any case law and without citation to settled authority." A-11, n.4. The district judge also rejected respondents' due process and equal protection claims. A-26 to A-35.

The court of appeals reversed in a unanimous decision, per Judge Kravitch, holding that respondents' dismissals violated their first amendment right of free speech. A-1 to A-18. Employing the approach of Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), the court easily found that the removal of the flag emblem was at least a motivating factor in the respondents' dismissal. A-11,

A-12. Next the court applied the balancing test of Pickering v. Board of Education, 391 U.S. 563 (1968) and Connick v. Myers, \_\_\_ U.S. \_\_\_, 103 S.Ct. 1684 (1983), to conclude that the activity was protected by the first amendment. A-12 to A-17. In so doing, the court found that the removal of the flag emblem was "akin to pure speech," that the speech involved public issues of the highest importance, and that, carefully balancing these speech interests against the municipal interests advanced in the record to justify the dismissals, the respondents' activities were constitutionally protected. A-13 to A-17.

## SUMMARY OF ARGUMENT

In considering whether or not respondent police officers' removal of flag emblems from their uniforms was protected activity under the first amendment, the court of appeals properly considered the record in detail and applied the balancing test of Pickering v. Board of Education, 391 U.S. 563 (1968) and its progeny, including Connick v. Myers, \_\_\_ U.S. \_\_\_, 103 S.Ct. 1684 (1983). Given the strong interest in public employees commenting on matters of racial discrimination, and the petitioners' failure to establish any interest in enforcing the flag emblem, other than suppression of speech, the court of appeals found that the activity was protected. It then considered whether or not the record established

that the petitioners would have fired the respondents in the absence of the protected activity, as required by Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), and found the petitioners had failed in proof.

The court of appeals did not err in not discussing such cases as Kelley v. Johnson, 425 U.S. 238 (1976) and United States v. O'Brien, 391 U.S. 367 (1968); Kelley, because a rational relationship test would be an inappropriate standard in a first amendment case; and O'Brien because, inter alia, petitioners did not establish that they had any interest apart from suppressing free speech.

Petitioners arguments that they were denied an opportunity to show that they would have fired respondents despite the protected activity and that they should avoid liability because of immunity

fail on this record largely because petitioners failed to put on evidence and advance arguments when they had opportunities to do so.

No due process issue under Arnett v. Kennedy, 416 U.S. 134 (1974) is presented because the decision below rested on a violation of first amendment rights, not due process rights.

REASONS THE PETITION FOR  
WRIT OF CERTIORARI SHOULD  
BE DENIED

Petitioners attempt to create the impression of a court of appeals decision at odds with rulings of this

Court, in conflict with decisions of other circuits, and oblivious to petitioners' defenses. In fact, the decision below is firmly anchored in settled doctrine of this Court and properly applied those rules to the detailed record made by the respondents and largely unanswered by the petitioners. Any quarrels the petitioners may have are with the weakness of their proof and the indifference of their defense. In an area of law so informed by fact based, case-by-case balancing of the rights of government employees and the interests of municipal employers, a case where the lower court carefully measured the interests and struck the balance is surely an inappropriate occasion for plenary review.

I. The Court of Appeals Properly Applied the Balancing Test of Pickering v. Board of Education, 391 U.S. 563 (1968).

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The basic question addressed by the court of appeals was whether the respondents' activities were protected under the first amendment. In Connick v. Myers, \_\_\_ U.S. \_\_\_, 103 S.Ct. 1684 (1983), this Court once again stressed that the balancing test of Pickering v. Board of Education, 391 U.S. 563 (1968), used to resolve that question, is one applied in an enormous variety of particularized factual situations involving critical statements by public employees. The court of appeals performed a careful and appropriate application of the Pickering balancing test, guided as well by this Court's recent decision in Connick v.

Myers.<sup>1</sup> The court of appeals, properly applying the Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), framework for the Pickering analysis, proceeded as follows.

1. Respondents were required to prove their speech was a substantial or motivating factor in the discharge. The court of appeals found, and no one has seriously disputed, that the flag incident caused the firings.

2. Respondents then had to prove that their speech was protected. Here the court of appeals applied the Pickering balancing test, discussing both (a) the interest of the employee in commenting on matters of public concern and (b) the employer's interest in

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1. Curiously the petition for writ of certiorari makes no mention of Connick v. Myers, this Court's most recent decision in the Pickering area.

promoting the efficiency of the public services it provides through its employees.

2a. The court of appeals found respondents' interest was heavily weighted in favor of being protected activity. First, the activity involved peaceful, respectful removal of an emblem which is frequently the focal point of freedom of expression.<sup>1</sup> Second,

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1. Petitioners refer to the Court's grant of review in Clark v. Community for Creative Non-Violence, No. 82-1998, cert. granted 104 S.Ct. 65 (1983), to justify review here. As Connick v. Myers pointed out, however, the intensely factual balancing test makes it inappropriate to lay down general standards. But whatever the Court may conclude with respect to sleeping in a national park as a statement of the homeless, the expression here is well within the ambit of first amendment recognition. "The Court for decades has recognized the communicative connotations of the use of flags." Spence v. State of Washington, 418 U.S. 405, 410 (1974). Indeed, even the Solicitor General in Clark concedes that flag cases "involve[] conduct that FOOTNOTE CONT'D NEXT PAGE...

the speech was directed at a perception of racial discrimination by the police department, discrimination that affected not only the officers, but the community. Certainly the court was correct here. Connick v. Myers, supra, 103 S.Ct. at 1689; NAACP v. Claiborne Hardware Co., \_\_\_ U.S. \_\_\_, 102 S.Ct. 3409, 3426 (1982); Givhan v. Western Line Consolidated Sch. Dist., 439 U.S. 410 (1979). Indeed, the Connick Court, in discussing Givhan, made it plain that employees' statements concerning racial discrimination in a municipal agency are matters "inherently of public concern" in the Pickering calculus. 103 S.Ct. at 1691, n.8.

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FOOTNOTE CONT'D...

[is] inherently expressive." No. 82-1998, Brief for the Petitioners, 21. Moreover, Clark involves the government claimed interests in managing competing uses of a national park, concerns different from the asserted municipal interests considered below.

Third, the fact that police officers are involved does not water down their rights, citing Garrity v. New Jersey, 385 U.S. 493 (1967). A-13 to A-15.<sup>1</sup>

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1. Petitioner's first reason for granting certiorari is that the court of appeals overlooked this Court's decision in Kelley v. Johnson, 425 U.S. 238 (1976). Characteristically, the petitioners, who now claim Kelley is pivotal to the issues in this case, failed even to cite that decision in their brief to the court of appeals. Only after that court ruled against them did the petitioners discover Kelley and refer to it in a petition for rehearing.

In any event, Kelley v. Johnson, which applied a rational relationship test to a policeman's claimed general liberty interest in his hairstyle, is inapposite to a police officer's claim under the first amendment. See Pienta v. Village of Schaumburg, 710 F.2d 1258 (7th Cir. 1983). In Elrod v. Burns, 427 U.S. 347 (1976), decided shortly after Kelley, this Court applied heightened standards to judge the first amendment claims of law enforcement employees.

2b. In examining the petitioners' interest in suppressing the speech, the court of appeals looked beneath the veneer of the "paramilitary" argument, to ascertain "the true interest the Department has in suppressing the speech ...". A-15. It found that the evidence showed that the flag ruled "required a flag patch on the sleeve of a police uniform, it did nothing more and nothing less," A-16, having "no relation to the efficient performance of police duties," ibid, according to the petitioners' own testimony. The court found further that if adherence to a council resolution is used to suppress constitutional activity, there must be an interest apart from the resolution. A-15. However, since the "[u]ncontroverted evidence at trial indicated that a number of police officers invariably were without the

flag patch," A-16, petitioners failed there as well. The court concluded the Pickering balance as follows:

Weighing the strong interest of appellants in speaking on a matter of public importance against the interest of the City in having the flag worn on the uniform, an interest no City official showed concern for until these black officers took the patch off, we can only conclude the speech was protected.

A-17.

Finally, the petitioners complain that the court of appeals failed to apply United States v. O'Brien, 391 U.S. 367 (1968). Two responses are in order. First, in one sense, this is basically not an O'Brien case: rather the communicative activity here is well within the mainstream of this Court's symbolic speech cases. See, Wooley v. Maynard, 430 U.S. 705 (1977); Spence v. Washington, supra; Tinker v. Des Moines

School District, 393 U.S. 503 (1969);  
West Virginia State Board of Ed. v.  
Barnette, 319 U.S. 624 (1943); Stromberg  
v. California, 283 U.S. 359 (1931).

But second, even if O'Brien is relevant, petitioners recite its four-part test but utterly fail to suggest how the record might conceivably be interpreted to show they meet the test. Indeed, in significant ways, application of the O'Brien tests is performed in the course of striking the Pickering balance. The court below did assess whether enforcement of the flag emblem requirement furthered "an important or substantial governmental interest," "unrelated to the suppression of free expression," 391 U.S. at 377. The court found that the petitioners failed in proof that their rule furthered any underlying interest, much less an important or substantial one. Moreover, based on the record, the petitioners were found to

have enforced the rule in order to suppress free expression. A-17. Thus, even under the O'Brien approach, the petitioners fare no better than they did under the Pickering test.

In short, the court of appeals, carefully following the prescribed procedure, thoroughly assessing the factual setting shown in the record and the evidence bearing on the petitioners' justifications, correctly applied the Pickering balancing test to conclude that the respondents' activity was protected by the first amendment. There is nothing here that merits plenary review.

II. The Petitioners Had Ample Opportunity to Comply With Mt. Healthy, Even Years After That Decision, But Simply Failed To Do So.

Once the respondents established their claim under Pickering, the court

of appeals then properly addressed whether petitioners had met their burden, as Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274 (1977), requires, of showing by a preponderance of the evidence that the firings would have occurred even in the absence of the protected conduct. The court found that petitioners had entirely failed to meet that burden, and accordingly reversed and remanded for an appropriate remedy.

The petitioners claim now that because this case was tried in 1975, they were unfairly saddled with the burden of proving they would have fired respondents despite the latter's first amendment activity, a burden made specific two years subsequent to the trial by the Mt. Healthy decision. Petition, 23-25.<sup>1</sup>

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1. Petitioners additionally suggest, in the editorial comment following FOOTNOTE CONT'D NEXT PAGE...

Petitioners' argument has no merit. They had ample opportunity after the Mt. Healthy decision to supplement the record and elected not to do so. The court of appeals in remanding the case in 1977 for decision took care to note that although a full trial had already been held, the district court was free to "allow the record to be appropriately supplemented."

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FOOTNOTE CONT'D...

their fourth question presented, Petition, iii-iv, that a defendant should only be subject to burden shifting after "defendants' lawyer knows of the rule and defendants' lawyer knows that a trial judge has ruled that a First Amendment violation has occurred (e.g., by denying a motion for directed verdict or a motion for summary dismissal)..." Ibid.

(Emphasis original). However convenient that might be for defense counsel, when a successful defense might depend upon putting on evidence in rebuttal or of an affirmative defense, a defense attorney who rests his case without putting on the evidence does so at risk.

The petitioners made no motion for a directed verdict or any similar motion either at the close of plaintiffs' case or at the close of all evidence. To follow their suggestion would be to encourage piecemeal litigation.

A-55, n.6. This Court denied the petitioners' previous petition for writ of certiorari on June 25, 1979. Thus when the case returned to the district court, two years had elapsed since the Mt. Healthy decision. Six months had elapsed since the Givhan v. Western Line Consol. Sch. Dist., supra, decision, which elaborated on the Mt. Healthy approach. Four years after Mt. Healthy the parties each moved for judgment on the existing record, and five years after Mt. Healthy the district judge notified the parties he was ready to decide the merits. Supra, 19. Thus petitioners, who ask this Court to provide them an opportunity to offer evidence subsequent to the Mt. Healthy decision, have already had--and waived--such an opportunity.

Petitioners defended in trial and

appellate court on their theory that respondents were fired for removing the flag patches and that such action was not protected activity. Having lost on that line of defense they now argue they are unfairly denied an opportunity to prove a fall back defense. Not only were they not unfairly denied an opportunity to prove another defense, they were not denied the opportunity at all. They simply failed to put on their proof when they had the two opportunities, at trial and after remand, to do so.

Accordingly, there is no reason to issue a writ of certiorari to consider any issues relating to the Mt. Healthy and Givhan rules.

III. Given the Posture of this Case and the Evidence in This Record, None of the Other Points Raised in the Petition Warrants Review.

A. No Issues Concerning Arnett  
v. Kennedy, 416 U.S. 134  
(1974), are Presented in  
this Case.

The petitioners argue that the court of appeals should have applied Arnett v. Kennedy, 416 U.S. 134 (1974), to hold that any procedural violations accompanying respondents' dismissals were cured by the post-dismissal hearings before the police hearing board. The response to this is simple. The decision below was based solely on the violation of respondents' first amendment rights. Although the court of appeals observed that the petitioners had committed wholesale violations of their own procedures in carrying out the dismissals, the court did not need to base its decision on any due process grounds. Whether or not a post-termination hearing can remedy a prior procedural flaw, it surely cannot

remedy a substantive denial of first amendment rights.<sup>1</sup>

B. Petitioners Failed to Establish a Defense of Good Faith.

Good faith is, of course, an affirmative defense which must be pleaded and proved. There is no doubt as to the city's liability for a decision made jointly by the mayor, director of public safety, and police chief and ratified by a hearing board. Owen v. City of Independence, 445 U.S. 622 (1980). Petitioners suggest they are in a dilemma because the district court never reached

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1. While respondents have pressed due process claims as additional grounds for invalidating their dismissals and would continue to do so if review were granted, the opinion below was not based on such grounds. Consequently unlike other cases which the Court has before it, e.g., Davis v. Scherer, prob. juris. noted 52 L.W. 3460 (No. 83-490, Dec. 12, 1983); Bd. of Ed. of Paris Union Sch. Dist. No. 95 v. Vail cert. granted, 104 S.Ct. 66 (1983), no issue regarding due process is presented by the petition in this case.

good faith defenses, and the court of appeals reversed without discussing such defenses.

While petitioners were allowed to amend their answer to raise their affirmative defense, R.388, they again failed to prove their position. Six respondents testified. None were asked questions that would have established a good faith defense. Indeed the opposite happened.

When police hearing board member and petitioner Leonard Leavell was on the stand, he was being questioned about one of the letters in which respondent was notified that his dismissal was upheld by a four to two vote. If petitioner Leavell had dissented or made certain comments during the deliberations these matters might have established his good faith. But his own lawyer objected. T. 427. Consequently, neither the breakdown of

the vote or the board's deliberations were allowed into evidence. T. 427-28.

While the district court made no findings regarding good faith, petitioners were not prohibited from pressing this defense in the court of appeals. It is axiomatic that they could defend a judgment on any ground appearing in the record. Le Tulle v. Scofield, 308 U.S. 415, 421 (1940). It is not surprising that they did not persuade the court of appeals of their position because their first mention of their defense came in passing in the conclusion of their brief to that court. Brief of Defendants-Appellees, (No. 82-8158, 11th Cir.) p. 42.

As with their Mt. Healthy point, the petitioners' plaint here is essentially an attempt to be relieved of their own indifference to establishing their defenses. On such a record plenary review is not required.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari is without merit and should be denied.

Respectfully submitted,

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NEIL BRADLEY\*  
LAUGHLIN McDONALD  
CHRISTOPHER COATES  
American Civil Liberties  
Union Foundation, Inc.  
52 Fairlie Street, NW  
Atlanta, Georgia 30303

JOEL M. GORA  
250 Joralemon Street  
Brooklyn, New York 11201

MARGIE PITTS HAMES  
Atlanta, Georgia 30308

E. RICHARD LARSON  
New York, New York 10036

ATTORNEY FOR RESPONDENTS  
\*Counsel of Record

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF GEORGIA

Chambers of  
J. Robert Elliott, Judge  
Columbus, Georgia February 11, 1982

Mr. Neil Bradley  
Associate Director  
American Civil Liberties Union  
52 Fairlie Street, N.W.  
Suite 355  
Atlanta, Georgia 30303

Mr. E. H. Polleys, Jr.  
City Attorney  
P.O. Box 1340  
Columbus, Georgia 31902

RE: Robert Leonard, et al. v.  
The City of Columbus, C.A.  
1514, Columbus

Gentlemen:

As was noted in your recent letters to me, it appears that the case above identified is ready for disposition on the merits. During the last three days I have spent several hours reviewing this rather voluminous file and I expect to begin work on the draft of an opinion the first of next week. Because it is going to be necessary for me to be in court a large part of the week I will probably not be able to finish the opinion before the week is out, but I hope that I will